No. 83-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY GLEIXNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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39 pp

QUESTION PRESENTED FOR REVIEW

Was the Petitioner's Constitutional Rights under the Fifth and Fourteenth Amendments of the United States Constitution violated when Police Officers after giving the Miranda Warnings to the Petitioner elicited from him an admission through trickery and deception.

LIST OF PARTIES

The parties to the instant proceeding are Harry Gleixner, Petitioner and the People of the State of New York as Respondent.

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IN THE
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NO.

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-against-

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DEPARTMENT OF THE SUPREME COURT
OF THE STATE OF NEW YORK

To the Honorable The Chief Justice, and
Associate Justices of the Supreme
Court of the United States:

OPINIONS BELOW

The opinion of the original Trial Judge denying Petitioner's Motion to Suppress the admissions taken by Police Officers was not officially reported, but is reproduced herein, in Appendix B. The opinion of the Appellate Division, Second Department affirming the ruling of the Trial Judge has been officially reported in 99 AD2d 842 (2nd Dept., 1984) A copy of said opinion is reproduced herein, in Appendix C. The Order of the New York Court of Appeals denying leave to Appeal has not yet been officially reported, but is reproduced herein, in Appendix D.

JURISDICTIONAL GROUNDS

The Order of the Appellate Division Second Department was entered on February 27, 1984. The Order of the Court of Appeals of the State of New York denying

leave to Appeal was entered on April 4, 1984. The Petitioner is therefore timely filing this Application for a Writ of Certiorari pursuant to Rule 20 of the Supreme Court Rules and the Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in this case are the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

In the case at bar a New York City Detective alleged that the Petitioner, an eighteen year old high school senior had made a statement to him some two hours after arrest acknowledging the commission of the crime. The admission was made after the giving of the Miranda warnings and after the Petitioner had initially denied any involvement in the incident.

The Petitioner had moved in the trial court to suppress the use of the statement in question, alleging denial of federal constitutional rights. The Court below held a Huntley hearing on the

issue and it was undisputed during the hearing that the alleged admission had occurred after the Detective had falsely indicated to the Petitioner that his fingerprints matched those found on the dollar bill given to the complainant by the perpetrator.

Despite this deception the Court below found that the statement was admissible since the appellant had been advised of his rights and had voluntarily waived them. The Court below relied heavily in its determination on the general principle that deception alone did not constitute a violation of the petitioner's Fifth Amendment rights so as to render the statement inadmissible. Citing People v Boone, 22 NY2d 476 (1968); People v Sunset Bay, 76 AD2d 592 (1st Dept., 1980); Robinson v Smith, 451 F. Supp. 1278 (1978);

Everett v Murphy, 239 F2d 68 (Cert. denied 377 US 967); State v Winters, 556 P.2d 809 (Ariz. App. 1976). (See Appendix B). The Appellate Division, Second Department, without discussing the issue affirmed the ruling of the trial court.

In Lisenba v California, 314 US 219 (1941), this Court clearly stated:

> "as applied to a Criminal Trial denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

This Court then continued:

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

This Court then concluded at page 237:

> "If, by fraud,collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured and used in the trial."

Despite this Court's pronouncements in Lisenba, supra, the Courts have continued to consider deceptive police practices only as a factor to be considered in a "totality of circumstances approach." Thus the instant Petition offers this Court a unique opportunity to decide whether deception alone in the taking of a confession or admission violates due process rights.

Significantly, a learned commentary at 99 ALR 2d 778 aptly

observes:

> "The absence of any real attempt to re-examine the underlying reasons upon which the general rules are traditionally based and to measure them against the modern concept of due process and rules of evidence is particularly surprising since the rule that the use of subterfuge alone does not render a confession induced thereby inadmissible is disliked by most of the courts, which in many cases have expressed their distaste for the use of subterfuges, particularly in their more flagrant forms, and have indicated that they considered themselves bound only because of earlier decisions on this point."

The author thereafter at page 782 interestingly makes the following observation:

> "In view of the fact that courts from nearly all jurisdictions have expressed their intense

> dislike of the use of deceit and fraud in obtaining a confession, it would not be too surprising if some day in the future the use of subterfuge-particularly in its more flagrant forms-would be considered as such a violation of the principles of fairness as to render confessions obtained in this way vulnerable to constitutional objections. The Supreme Court has not only left the way open for such a development by frequently stating that no exact formula for determining whether a confession was voluntary can be established, but has emphasized with increasing frequency 'the expanded concepts of fairness in obtaining confessions,' in support of which it has gone to new lengths in applying the due process clause to state procedures concerning determination of the voluntariness of a confession."

The general rule followed by the

Courts below has its foundation in case law of a by-gone era when concepts of Miranda rights and procedural safeguards in the criminal law were unheard of.

An analysis of why this general rule should continue to be blindly followed reveals no logical answer when viewed in the light of today's modern concept of due process.

It is respectfully submitted that it is time for this Court to fully re-examine the general rule on deceptive police practices in the light of modern concepts and to cease to tacitly condone such deceptive practices by a failure to exclude from admissibility the fruits of such deception.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

APPENDIX A -

ORDER OF JUSTICE PHILIP J. CHETTA, IN THE SUPREME COURT, QUEENS COUNTY, CRIMINAL TERM, PART K-10, APRIL 6, 1983.

Ind. No. 1616/82

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-10

THE PEOPLE OF THE STATE OF NEW YORK

- against -

HARRY GLEIXNER

Defendant.

Upon the foregoing papers and in the opinion of the Court herein, defendant's motion to suppress statements made by him is denied in accordance with the accompanying memorandum dated April 6, 1983.

E N T E R

GRANTED:
Date: April 6, 1983
John Durante

s/ PHILIP J. CHETTA
JUSTICE SUPREME COURT

APPENDIX B -

MEMORANDUM DECISION DATED APRIL 6, 1983.
OF JUSTICE PHILIP J. CHETTA.

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART K-10

THE PEOPLE OF THE STATE OF NEW YORK

- against -

HARRY GLEIXNER

Defendant.

Defendant moves to suppress statements based upon their involuntary nature. A hearing to contest the admissibility of such statements was conducted on February 17, 1982. Detective Jerry Friedman was called by the People and defendant testified on his own behalf. Based upon this testimony, the Court makes the following findings of fact and conclusions of law.

Detective Friedman testified that defendant, who has been indicted for

Sodomy in the first degree, was arrested by a radio patrol car following identification by complainant and his mother.[1] Detective Friedman stated that he was present when his partner, Detective Vargas read defendant his Miranda rights, the detective relating that defendant was advised of his rights and indicated his understanding and willingness to speak with the officers. The defendant denied his involvement in the crime. The officer then asked defendant if he would agree to be fingerprinted and the defendant agreed.[2] The detective further testified that after the prints were taken he went into an adjoining room and compared the prints with those allegedly found on a dollar bill given to the complainant by the perpetrator as a means of securing his silence. With the use of a magnifying glass and aware that defendant was able to hear him, Detective

Friedman stated to his partner that the two prints were similar. In reality, there were no prints on the bill. Defendant then called out, "I don't know why I did it."

The defendant testified that at the time of the arrest, he was 18 years old and that he had been drinking heavily. Defendant remembered being arrested by uniformed officers and crying while at the precinct. However, defendant did not remember if or when he was given his rights or making any statements to Detective Friedman. Defendant did believe that he made statements or talked with Detective Vargas, Friedman's partner.

Based upon the testimony, the Court finds that Detective Friedman's version of the facts is more credible than that presented by the defendant. Friedman

had a full and fair recollection of the events in question whereas defendant's testimony was spotty and replete with lapses of recollection with regard to crucial events in question. Defendant did believe he spoke to Detective Vargas, which would lend further credence to Detective Friedman's testimony as Friedman stated that Vargas had informed defendant of his Miranda rights.

Based upon Detective Friedman's testimony, the Court finds that defendant was fully advised of his rights and knowingly and voluntarily waived them. There is thus, no issue with regard to whether defendant expressly waived his Miranda rights, see Butler v. North Carolina, 441 U.S. 369, or that the waiver was unduly influenced by police conduct as any police deception occurred following defendant's waiver of his Miranda rights. See People v. Campbell,

81 A.D. 2d 300.. People v. Cole,89 AD2d 471

Having found a knowing waiver, the issue which the above facts set squarely before the Court is whether the incriminating statement by the defendant may be deemed voluntary or must be suppressed as the fruit of deceptive police practices. For the foregoing reasons, the Court finds that the statement was voluntary, despite the admitted police deception, and as a consequence, defendant's motion to suppress said statement is denied.

At the outset, it is clear the defendant's statement was made in response to his being falsely advised of the alleged match in fingerprints, for prior to this time, defendant maintained his innocence.

With this fact in mind, the Court nonetheless starts with the proposition that police deception in and of itself

does not invalidate a resultant confession. See People v. Sunset Bay, 76 A.D. 2d 592 (First Dept., 1980). "...[D]eception alone, in the absence of any threat or promise of immunity, is not enough to render a confession involuntary." See People v. Boone, 22 N.Y. 2d 476, 483 cert. den. 393 U.S. 99.

The apparent rational behind this proposition is that,

> "[C]onfessions generally are not vitiated when they are obtained by deception or trickery, as long as the means employed are not calculated to produce an untrue statement." See Ringle, Searches and Seizures, Arrests and Confessions. §25.2 (2ed. 1980)
>
> "Since most courts take the view that deception is an acceptable police interrogation technique when it is not likely to elicit untrue statements from a suspect, telling a suspect falsehoods regarding the status of the case is widely accepted."

id, §25.2 (D) [2].

Thus, while deception is a factor to be considered in determining the voluntariness of the statement, (see Sunset Bay, supra) it must be considered along with such other factors as the background of the defendant, time, place and length of interrogation, delay in arraignment, request for counsel or knowledge of said rights, (see Boone, supra) or any other relevant factor which would render the statement involuntary or likely to produce an untrue confession.

Turning to several earlier decisions with regard to police deception, it is clear that when confessions were suppressed as involuntary, it was due to a combination of factors, one of which may have been police deception. Deception alone has failed to result in the suppression of a defendant's confession. In Spano v. New York, 360 U.S. 315,

defendant was told by a lifetime friend and present member of the police force, that failure to confess would cost the officer his job and have adverse consequences for the officer's family and then pregnant wife. However, suppression of defendant's statements was suppressed when such deception was considered in conjunction with the defendant's denial of access to his attorney despite repeated requests to see him and continued interrogation for 18 hours by 15 different participants. Similarly, in Robinson v. Smith, 451 Fed. Sup. 1278, (2nd Dist., 1978), the deceptive technique of falsely informing the defendant that his co-defendant had implicated him in the crime was considered in conjunction with a panoply of other coercive or deceptive practices in declaring defendant's confession involuntary.

As stated in Robinson,

> Where deception, fraud, collusion or trickery and other coercion have been combined, a confession may be suppressed as violative of due process of law. Courts which have found deception or trickery to be a significant factor have focused on the combination of unfilled promises of assistance or benefits which were reinforced (emphasis supplied) by the deception or upon other coercive factors which were accompanied by police deception or fraud. (citations omitted)

In Everett v. Murphy, 329 Fed. 2d 68, cert. denied, 377 U.S. 967, failure to inform the defendant that the victim had died, in and of itself was insufficient to warrant suppression. However, when viewed in conjunction with police promises of leniency, rendered the statement involuntary.

If any one factor can be considered the sine qua non of involuntariness it is the promise by the police of more lenient treatment if defendant admits his

wrongdoing. See People v. McQueen, 18 N.Y. 2d 337, (deception in the absence of a promise or threat is not enough). It is clear, that the overriding concern of the courts in excluding statements that are the product of false promises or threats is the fact that such actions may be deemed the most pervasive factors in persuading a defendant to falsely incriminate himself. Indeed, false promises which create a substantial risk that defendant might falsely incriminate himself, statutorily invalidate any subsequent confession. See CPL §60.45 [subd. 2 par. (B) I]. Clearly, where an individual believes that his confession will result in more lenient treatment or cause physical abuse he has suffered to end, are factors which might induce even an innocent individual to confess to a crime of which he stands accused. People v. Sunset Bay and the facts recited

therein, constitute an example where a variety of factors including intensive interrogation, deception as to the amount of incriminating evidence then possessed by the police, the emotional state of defendant and apparent promises of help and leniency if defendant confessed when viewed under a totality of the circumstances test, (see Haynes v. Washington, 373 U.S. 503, and Lynumn v. Illinois, 372 U.S. 528) rendered the subsequent confession involuntary. Also see People v. Periera, 26 N.Y.2d 265,People v.Boone, supra, People v. Solari, 43 AD2d 610,affd 35 NY2d 876, People v.Caserino 16 NY2d 255

The Court thus turns to the instant case and whether the facts warrant a finding of a constitutional or statutory basis for suppression of defendant's statements. For analogy, State v. Winters, 556 P. 2d 809 (Ariz. App. 1976) is on all fours with the instant facts.

In Winters, defendant was falsely informed by the police that his prints matched those found at the scene. Defendant contended that this deception induced his confession and as a consequence, should be suppressed. The Court in denying suppression upon this ground, reiterated the oft mentioned axiom that deception alone will not render a statement inadmissible, that voluntariness is determined by a totality of the circumstances. The Court further opined that deception without further evidence that defendant's will was overborne or that his confession was false or unreliable would not constitute involuntariness. Based upon a totality of the circumstances, the Court concluded that defendant's will was not overborne to a degree sufficient to render his statements either false or unreliable.

Based upon the facts before this

Court, a similar conclusion must be reached. Detective Friedman's testimony was that defendant was advised of his Miranda rights, that one of the rights he was advised of was his right to counsel, and despite awareness of this right, defendant neither requested, nor as a consequence, was denied an opportunity to consult with an attorney. See Spano, supra. The evidence fails to disclose any threats to induce defendant's confession or promises of help or any other conduct which might be construed as an offer of assistance in return for defendant's confession. See Sunset Bay, supra.

While defendant was 18 years of age and testified that he had been drinking heavily, Detective Friedman's testimony was contradictory in that he testified that defendant understood and knowingly waived his rights.

The interrpgation itself was of limited degree, devoid of both length and intensity, see Lisemba v. Calif. 314 U.S. 219, so as to be a contributing factor in undermining defendant's free will.

In essence, the record presents only the admitted police deception and while the Court would not go so far as to characterize it, as the District Attorney does, "as the essence of creative investigatory technique", finds that the deception alone, when viewed in light of the circumstances surrounding the admission, did not result in defendant's will being overborne or result in an unreliable untruthful statement being induced. Nor does the evidence establish a statutory violation under CPL §60.45. Accordingly, the Court finds that the People have met their burden of proof that defendant's statement was volunary

in nature and not violative of his Fifth amendment rights.

Defendant's motion to suppress his statement is, therefore, denied.

This constitutes the decision and order of the Court

The clerk of the Court is directed to mail a copy of this decision and order to the attorney for the defendant.

s/ PHILIP J. CHETTA,J.S.C

FOOTNOTES

1. Counsel has specifically stated that he will not contest the arrest of the defendant. See Dunaway v. New York, 442 U.S. 200, 1979.

2. No issue with regard to the fingerprints has been raised and in light of Schmerber v. California 384 U.S. 757, would appear without merit, if so raised by counsel.

APPENDIX C -

ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, FEBRUARY 27, 1984.

At a term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County, on February 27, 1984.

HON. LEON D. LAZER, Justice Presiding
HON. DAVID T. GIBBONS,
HON. WILLIAM C. THOMPSON,
HON. SEYMOUR BOYERS.

Justices

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

v.

HARRY GLEIXNER,

Appellant.

In the above entitled action, the above named Harry Gleixner, defendant in this action, having appealed to this court from a judgment of the Supreme Court, Queens County, rendered May 11,

1983, convicting him of sodomy in the first degree (two counts) and endangering the welfare of a child, upon a jury verdict, and sentencing him to concurrent terms of imprisonment of 3 1/3 years to 10 years on each of the sodomy convictions and one year upon the conviction of endangering the welfare of a child; and the said appeal having been argued by Spiros A. Tsimbinos, Esq., of counsel for the appellant, and argued by Annette Cohen, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby modified, as a matter of discretion in the interest of justice, by reducing the sentences imposed upon the defendant's convictions of sodomy in the first degree to concurrent terms of im-

prisonment of two to six years upon each of those convictions, and, as so modified said judgment unanimously affirmed, and the case is hereby remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50(subd. 5).

Enter:

Irving N. Selkin

Clerk of the
Appellate Division.

APPENDIX C - continued

DECISION OF THE APPELLATE DIVISION, SECOND DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, FEBRUARY 27, 1984.

Appeal by defendant from a judgment of the Supreme Court, Queens County (NARO, J.), rendered May 11, 1983, convicting him of sodomy in the first degree (two counts) and endangering the welfare of a child, upon a jury verdict, and sentencing him to concurrent terms of imprisonment of 3 1/3 years to 10 years on each of the sodomy convictions and one year upon the conviction of endangering the welfare of a child.

Judgment modified, as a matter of discretion in the interest of justice, by reducing the sentences imposed upon the defendant's convictions of sodomy in the first degree to concurrent terms of imprisonment of two to six years upon

each of those convictions. As so modified, judgment affirmed, and case remitted to the Supreme Court, Queens County, for further proceedings pursuant to CPL 460.50 (subd 5).

The sentence was excessive to the extent indicated herein (People v Suitte, 90 AD2d 80).

We have considered the defendant's remaining contentions and find them to be without merit.

LAZER, J.P., GIBBONS, THOMPSON and BOYERS, JJ., concur.

APPENDIX D -

ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DENYING LEAVE TO APPEAL.

BEFORE: HON. LAWRENCE H. COOKE,
Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

HARRY GLEIXNER,

Appellant.

CERTIFICATE DENYING LEAVE

I, LAWRENCE H. COOKE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and

permission to appeal is hereby denied.

Request for a Hearing denied.

Dated at Monticello, New York
April 4, 1984

s/ LAWRENCE H. COOKE,
CHIEF JUDGE

* Description of Order: Order of the Appellate Division, Second Department, of February 27, 1984, which modified, as a matter of discretion in the interest of justice, the judgment of the Supreme Court, Queens County, rendered May 11, 1983, by reducing the sentences imposed upon the defendant's convictions of sodomy in the first degree to concurrent terms of imprisonment of two to six years upon each of those convictions, and, as so modified, unanimously affirmed said judgment of conviction.